October 28, 1940

Reversed.

CITY ATTORNEY'S SUMMARY OF MATERIAL FACTS BEFORE THE COURT IN THE STATEMENT ON APPEAL.

Defendant, a licensed Chiropractor, was charged with violation of Section 2141 of the Business and Professions Code. It was his defense that the medicines and other substances sold to the deceased patient, were not prescribed by him for an ailment, blemish, etc. Defendant was permitted to testify to conversations had with the deceased in the presence of her husband but objection was sustained as to all conversations between defendant and the deceased alone.

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IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. LAWRENCE GAYLOR, Defendant and Appellant.	Superior Court No. CR A 1723 Trial Court No. 97474 MEMORANDUM OPINION

Appeal by defendant from a judgment and orders made by the Municipal Court of the City of Los Angeles, Byron J. Walters, Judge. Judgment and order denying motion for new trial reversed; all other appeals dismissed.

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It may well have been that the only one of the many facets of the complaint against the defendant on which the

jury agreed was the one in support of which so many exhibits were introduced; that is, the charge that he had prescribed for Mrs. Greene. Her widower testified to many conversations had with the defendant which, if a true account of how the exhibits came to be in the possession of himself and his wife, abundantly supported the charge. The defendant, however, had a different version of the conversations which led up to the delivery from him to the Greenes of the many exhibits. Had the jury accepted the defendant's version it would have caused them to believe that he had sold, without prescribing, the various exhibits to the Greenes. Defendant's version was not allowed to reach the jury, however, except in ragged fragments. We are of the opinion that it was error to sustain the People's objections to the questions intended to develop defendant's theory, and obviously the error was prejudicial.

Defendant's contention was that the conversations he had had concerning the various exhibits, were not in the presence of Mr. Greene, but were with Mrs. Greene alone. To these conversations he was not allowed to testify, as he offered his defense, the objection being made on the ground that the conversations were not within subsection 4 of section 1870, Code of Civil Procedure, and this subsection is the only authority contained in the People's points and authorities in support of the conclusion that the conversations were "clearly inadmissible." An examination of the contents of subsection 4 indicates that it extends rather than limits the general rules of evidence, as they affect the acts and declarations of deceased persons. The subsection recognizes certain exceptions to the hearsay rule

in the case of decedents (Estate of Ross (1921) 187 Cal. 454, 467); it does not say that no other "act or declaration" than those named may be introduced into evidence. It does not except the declarations of decedents from the operation of section 1850, Code of Civil Procedure, which says: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." In this connection note People v. Travis (1880) 56 Cal. 251; People v. Lem You (1893) 97 Cal. 224, 226; Mattingly v. Pennie (1895) 105 Cal. 514, 524; People v. Fong Sing (1918) 38 Cal. App. 253, 258; Blackwell v. American Film Co. (1922) 189 Cal. 689, 699; Sethman v. Bulkley (1937) 9 Cal. (2) 21, 24. Had the nurse overheard Mrs. Greene say: "Doctor, what should I take?" it would have been permissible for the nurse to have testified that that question was asked and the defendant answered "This." It was equally permissible for the defendant to prove, if he could, that the conversation that he had with Mrs. Greene resulted in a sale, not a prescription, of the medicines, etc. that she received.

When it appeared without question that the defendant had a license to practice chiropractic, it appeared that he was cleared of a portion of the charges against him, for within the scope of his license a chiropractor may lawfully do some acts forbidden by section 2141 Business and Professions Code. To the instructions which it is evident that the trial judge carefully considered, should have been

added one to the effect that the defendant, under his license, could lawfully make a diagnosis. We do not discover that this matter was covered, and as the defendant did diagnose, it should not have been omitted. We make no comment on other matters which have been discussed in the points and authorities.

The judgment and the order denying motion for a new trial are reversed and the cause is remanded to the Municipal Court for a new trial; all other appeals are dismissed.

Dated: October 28, 1940.

BISHOP
Judge

I concur,

SHAW
Presiding Judge

I agree generally with the views of my associates as to the item of wrongful exclusion of evidence but am of the opinion that the complaint fails to state a public offense and hence should be dismissed.

It is conceded that the complaint would not state a public offense if it did not negative the possession by defendant of a certificate from either the board of medical examiners or the board of osteopathic examiners (see People v. Fowler (1938) 32 Cal. App. (2d) (Supp.) 737, 740). Since by the initiative Chiropractic Act (Stats. 1923, p. lxxxviii, Deering's Gen. Laws, 1937 ed., Act 4811) a board of chiropractic examiners is provided for and a certificate can be issued by this latter board authorizing the holder thereof to do any or all of the things charged in the complaint to have been done by defendant, I fail to

comprehend how, logically, a complaint alleging the practice of a mode of treating the sick can be held to be sufficient against any person unless it either negatives the possession of a certificate issued by any of the three authorized boards or alleges a specific act and negatives the possession of the type of certificate essential to the lawful performance of that act.

The chiropractic initiative act above identified does not purport to state an exception to any existing law; it is in fact and effect the repeal of all laws in conflict with it (§18, Act 4811, Deering's Gen. Laws, 1937; People v. Schuster (1932) 122 Cal. App. (Supp.) 790, 794). In order to ascertain whether an offense has been committed by any person merely through engaging in the practice of a mode of treating the sick (or in doing any act incidental thereto) it is necessary to examine the particular act done and ascertain whether the doer of that act possessed at the time a valid certificate from any of the three boards authorizing the performance by such person of that act. To determine the fact of crime in a particular case it is just as essential to consider the terms of the Chiropractic Act (supra) in connection with the terms of the Medical Practice Act (Act 4807, Deering's Gen. Laws, 1931) and the Osteopathic Act (Act 5727, Deering's Gen. Laws, 1937) as it was in the case of People v. Tilkin (1939) 34 Cal. App. (2d)743, People v. Gidaly (1939) 35 Cal. App. (2d) 758, and People v. Garcia (1939) 37 Cal. App. (2d) 753, to consider the various sections of the ordinance there involved in connection with each other. (The fact that the laws referred

to have been incorporated in the Business and Professions Code does not affect this discussion.)

Upon the reasoning in the authorities cited and the observations herein, the complaint we are dealing with does not state a public offense and should be dismissed.

SCHAUER
Judge